No. 86-39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, BALTIMORE AND OHIO CHICAGO TERMINAL COMPANY, CHESAPEAKE AND OHIO RAILWAY COMPANY, and CSX TRANSPORTATION, INC.,

Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

RICHARD J. SCHREIBER
Sr. Assistant Vice President—Law
BURLINGTON NORTHERN RAILROAD COMPANY
3800 Continental Plaza
Fort Worth, Texas 76102

MARK B. GOODWIN
Assistant General Solicitor
UNION PACIFIC RAILROAD COMPANY
1416 Dodge Street
Omaha, Nebraska 68179

RONALD A. LANE
General Attorney
SANTA FE SOUTHERN PACIFIC CORPORATION
224 South Michigan Avenue
Chicago, Illinois 60604

NICHOLAS S. YOVANOVIC
General Attorney
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, Florida 32202

REX E. LEE *
CARTER G. PHILLIPS
RONALD S. FLAGG
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4266

JAMES S. WHITEHEAD
LAWRENCE I. KIPPERMAN
SIDLEY & AUSTIN
One First National Plaza
Chicago, IL 60603

* Counsel of Record

Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-39

BURLINGTON NORTHERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, BALTIMORE AND OHIO CHICAGO TERMINAL COMPANY, CHESAPEAKE AND OHIO RAILWAY COMPANY, and CSX TRANSPORTATION, INC.,

Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITIONERS' SUPPLEMENTAL BRIEF

On July 15, 1986, seven of the Nation's major railroads filed a petition with this Court seeking review of a decision of the United States Court of Appeals for the Seventh Circuit holding that the Norris-LaGuardia Act,

29 U.S.C. § 101 *et seq.*, precluded federal courts from enjoining secondary picketing against rail carriers no matter how remote the connection between the primary employer and the picketing victims. On August 29, 1986, the respondent union, recognizing the substantial importance of the issues raised and the sharp intercircuit conflict over those issues, filed a brief in support of the petition.

On September 30, 1986, President Reagan signed into law[1] a joint resolution passed by Congress[2] (a copy of which is attached hereto as Appendix A) seeking to resolve the primary labor dispute giving rise to the secondary picketing involved in this case. The resolution calls for the imposition of recommendations made by Presidential Emergency Board 209[3] and an advisory board created pursuant to a prior joint resolution.[4] The two boards had recommended that the primary employers, the Maine Central and Portland Terminal Railroads, award severance pay to released employees and adopt nationally negotiated wage and health and welfare benefits.

The primary employers have stated publicly their view that S.J. Res. 415 does not settle the primary dispute because the measure is "unconstitutional and discriminatory".[5] Consistent with that view, Maine Central and Portland Terminal have initiated an action seeking to enjoin enforcement of the resolution. *Maine Cent. R. Co.* v.

---

[1] Pub. L. No. 99-431.

[2] S.J. Res. 415, 99th Cong., 2d Sess. (1986).

[3] On May 16, 1986, President Reagan issued Executive Order No. 12557, convening an Emergency Board under Section 10 of the Railway Labor Act, 45 U.S.C. § 160.

[4] H.J. Res. 683, 99th Cong., 2d Sess. (1986).

[5] "House Acts on Labor Dispute Issue," *The Journal of Commerce*, p. 6a (Sept. 24, 1986).

BMWE, C.A. No. 86-0311P (D. Me.), S.J. Res. 415 does not prohibit or make any mention of secondary picketing. In addition, there are over four dozen disputes between the primary employers and their labor organizations presently docketed and pending before the National Mediation Board and which are not covered by S.J. Res. 415. Accordingly, a threat of secondary picketing against petitioners and other railroads arising out of the dispute between Maine Central/Portland Terminal and BMWE remains in effect.

Moreover, even if S.J. Res. 415 were to resolve the primary dispute, review of the Seventh Circuit's decision by this Court would still be necessary and appropriate—a conclusion with which respondents, as well as petitioners agree. This Court has long held that its jurisdiction is not eliminated if the underlying dispute between the parties is one "capable of repetition, yet evading review." See, *e.g.*, *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 125 (1974); *Roe* v. *Wade*, 410 U.S. 113 (1973); *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). In particular, in the context of labor disputes, where "the great majority of economic strikes do not last long enough for complete judicial review of the controversies they engender," this Court has made clear that "[t]he judiciary must not close the door to the resolution of the important questions" so long as the underlying dispute is likely to recur. *Super Tire Engineering*, 416 U.S. at 126-27.

Here, the fundamental questions of whether secondary picketing against railroads is lawful and whether it may be enjoined by federal courts are not merely capable of repetition, but will inevitably recur vis-à-vis these petitioners as well as other railroads. Under the Seventh Circuit's decision, any railway union that has exhausted its remedies against the primary employer under the Railway Labor Act, has the absolute right to picket railroads throughout the country in order to pressure the

primary employer into settling or to raise the stakes in such a way that the President and Congress must intervene to force a settlement. It is inconceivable that this powerful economic weapon will be left unused in future railway labor disputes.

Yet, the fundamental issues raised in this case could easily continue to evade review. Railroad strikes generally are of relatively short duration, even compared to other labor disputes, because of the means provided under the Railway Labor Act for Presidential intervention. See 45 U.S.C. § 160.[6] In addition, Congress often intervenes in railway labor disputes because of the significant adverse effects railroad strikes have on interstate commerce. In this case, S.J. Res. 415 has been enacted at the eleventh hour of this Court's consideration of this petition—a pattern which is likely to recur whenever the union increases the national significance of the dispute by expanding or threatening to expand it to secondary employers in the future.

The Court will never have a case whose facts present the legal issues more clearly than they are presented here. Those issues are before the Court; they need to be decided and the Court should decide them now.

---

[6] As the President recognized in establishing Presidential Emergency Board No. 209, secondary picketing of the Nation's major railroads for even a few days would have a devastating and crippling effect on the Nation's economy. *See* White House Press Release Establishing Presidential Emergency Board No. 209, dated May 19, 1986 (attached as Appendix B to Brief of Respondents).

CONCLUSION

For the foregoing reasons, and for the reasons stated both in the Petition and in the Brief of Respondents, the Writ of Certiorari should be granted.

Respectfully submitted,

RICHARD J. SCHREIBER
Sr. Assistant Vice President—Law
BURLINGTON NORTHERN RAILROAD COMPANY
3800 Continental Plaza
Fort Worth, Texas 76102

MARK B. GOODWIN
Assistant General Solicitor
UNION PACIFIC RAILROAD COMPANY
1416 Dodge Street
Omaha, Nebraska 68179

RONALD A. LANE
General Attorney
SANTA FE SOUTHERN PACIFIC CORPORATION
224 South Michigan Avenue
Chicago, Illinois 60604

NICHOLAS S. YOVANOVIC
General Attorney
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, Florida 32202

REX E. LEE *
CARTER G. PHILLIPS
RONALD S. FLAGG
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4266

JAMES S. WHITEHEAD
LAWRENCE I. KIPPERMAN
SIDLEY & AUSTIN
One First National Plaza
Chicago, IL 60603

* Counsel of Record

Counsel for Petitioners

October 2, 1986

APPENDIX A

SJRes. 415 follows: (TEXT)

Whereas the labor dispute between the common rail carriers, Maine Central Railroad Company and Portland Terminal Company, and certain of the employees of such carriers represented by the Brotherhood of Maintenance of Way Employees threatens essential transportation services of the Nation;

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained;

Whereas the Congress finds that emergency measures are essential to security and continuity of transportation services by such carriers;

Whereas the President by Executive Order no. 12557 of May 16, 1986, pursuant to the provisions of section 10 of the Railway Labor Act (45 U.S.C. 160), created a Presidential Emergency Board to investigate the dispute and report findings;

Whereas the recommendations of Presidential Emergency Board No. 209 for settlement of such dispute have not yet resulted in a settlement;

Whereas the extension of the provisions of section 10 of the Railway Labor Act (45 U.S.C. 160) for an additional 60-day period to such dispute provided by the joint resolution entitled "Joint Resolution to provide for a temporary prohibition of strikes or lockouts with respect to the Maine Central Railroad Company and the Portland Terminal Company labor-management dispute", approved August 21, 1986 (Public Law 99-385), has not yet resulted in a settlement of such dispute;

Whereas the advisory board established pursuant to section 2 of such joint resolution recommended that in the

event that the parties to the dispute were unable to reach agreement on the dispute before September 13, 1986, the Congress should enact legislation directing the parties to accept and apply the recommendations of Emergency Board No. 209, and if such parties are unable to agree as to all necessary details in applying the recommendations of such Emergency Board, all such unsettled issues should be submitted to final and binding arbitration;

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not yet resulted in settlement of the dispute;

Whereas the Congress, under the Commerce Clause of the Constitution, has the authority and responsibility to ensure the uninterrupted operation of essential transportation services; and

Whereas the Congress in the past has enacted legislation for such purposes: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following conditions shall apply to the dispute referred to in Executive Order No. 12557 of May 16, 1986, between the common rail carriers, Maine Central Railroad Company and Portland Terminal Company (hereafter in this resolution referred to as the "carriers") and the employees of such carriers represented by the Brotherhood of Maintenance of Way Employees.

(1) The parties to such dispute shall take all necessary steps to restore or preserve the conditions out of which such dispute arose as such conditions existed before 12:01 ante meridiem of March 3, 1986, except as provided in paragraphs (2) through (4).

(2) The report and recommendations of Presidential Emergency Board No. 209 shall be binding on the

parties and shall have the same effect as though arrived at by agreement of the parties under the Railway Labor Act (45 U.S.C. 151 et. seq.), except that nothing in this joint resolution shall prevent a mutual written agreement by the parties to any terms and conditions different from those established by this joint resolution.

(3) (A) If there are unresolved implementing issues remaining with respect to the report and recommendations or agreement under paragraph (2) after 10 days after the date of the enactment of this joint resolution, the parties to the dispute shall enter into binding arbitration to provide for a resolution of such issues.

(B) The National Mediation Board established by section 4 of the Railway Labor Act (45 U.S.C. 154) shall appoint an arbitrator to resolve the issues described in subparagraph (A). Except as provided in this joint resolution, such arbitration shall be conducted as if it were under section 7 of such Act, and any award of such arbitration shall be enforceable as if under section 9 of such Act.

(1) Within 30 days after the date of the enactment of this joint resolution, the binding arbitration entered into pursuant to paragraph (3) shall be completed. (End of Text)